No. 75-787

In the Supreme Court of the United States

OCTOBER TERM, 1975

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

RAYMOND N. ZAGONE,
EDWARD J. SHAWAKER,
CHARLES W. SHIPLEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-787

TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 523 F. 2d 16.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1975. The petition for a writ

of certiorari was filed on December 2, 1975. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether this case is moot.

2. Whether the Administrator of the Environmental Protection Agency correctly interpreted Section 110(a)(2)(B) of the Clean Air Act, as added, 42 U.S.C. 1857c-5(a)(2)(B), to require that state implementation plans, designed to meet national ambient air quality standards, must use continuous emission reduction measures to the extent available rather than intermittent emission control measures.

STATUTE INVOLVED

Section 110 of the Clean Air Act, as added by the Clean Air Amendments of 1970, 84 Stat. 1680, 42 U.S.C. 1857c-5, is set out in pertinent part at Pet. 3-4.

STATEMENT

1. The Clean Air Act, 77 Stat. 392, as amended, 42 U.S.C. 1857, *et seq.*, requires the Administrator of the Environmental Protection Agency (the Administrator) to promulgate national primary and secondary ambient air quality standards that will protect the public from known or anticipated adverse effects of various air pollutants. Each State has the primary responsibility for assuring the quality of the air within its territory and must devise a state implementation plan (SIP) designed to, at a mini-

mum, implement, maintain and enforce the national primary and secondary ambient air quality standards.

Under Section 110(a)(2) of the Act, 42 U.S.C. 1857c-5(a)(2), the Administrator is required to approve the state implementation plan if he determines, *inter alia*, that "it includes emission limitations, schedules, and timetables for compliance with such limitations * * *." (Section 110(a)(2)(B), 42 U.S.C. 1857c-5(a)(2)(B)).

2. In December 1973, Kentucky submitted its state implementation plan, which contained the following provision Section 1(1)(b)):

> Where it is demonstrated to the satisfaction of the Commission that an air contaminant source can apply an alternate control strategy which will provide for achievement and maintenance of applicable ambient air quality standards, the Commission may, under such terms and conditions as it deems appropriate, authorize such a control strategy after a public hearing.

On August 9, 1974, the Administrator approved the Kentucky implementation plan, except with respect to Section 1(1)(b). He based his refusal to approve this part of the plan on the ground that Section 1(1)(b) "could be construed to permit intermittent control measures under circumstances where constant emission controls were available." 39 Fed. Reg. 29358.[1]

---

[1] Switching to cleaner fuels or curtailing plant operations when air quality declines are examples of intermittent control

Thereafter, petitioner and certain private power companies filed timely petitions for review of the Administrator's action in the United States Court of Appeals for the Sixth Circuit. The cases were consolidated. The Commonwealth of Kentucky, among others, intervened as a respondent.

3. On July 2, 1975, Kentucky adopted a new state implementation plan, retroactively taking effect on June 6, 1975, which deleted Section 1(1)(b). In its brief before the court of appeals Kentucky stated that (Br. for Commonwealth of Kentucky, p. 12):

> The air pollution control agency of this Commonwealth has indicated by its proposed regu-

---

measures; average long term emissions are not necessarily reduced as a result of such measures. As stated in the following EPA staff paper (119 Cong. Rec. 19190 (1973)):

> Depending on the circumstances, [an intermittent control system] may or may not reduce the *average* long-term emissions. If plant operation is curtailed during poor dispersion conditions, then it may be increased during good conditions to make up for the lost production. Average emissions would be about the same with or without [an intermittent control system] for this situation. If clean fuel is used to reduce emissions during poor dispersion conditions, then average emissions will be reduced somewhat. If fuel with higher sulfur content is used during good conditions, then average emissions could be greater with [an intermittent control system]. It must be concluded, therefore that although [an intermittent control system] employs temporary emission limitation, the long-range control method is that of taking advantage of good dispersion rather than emission reduction.

> lations that it does not desire to administer the provisions of the regulation involved [Section 1(1)(b)] and does not wish to have such a regulation included in the "Kentucky Plan." * * * [A]lternate control strategies are not to play a part in this Commonwealth's implementation of the Clean Air Act irrespective of the decision of this Court with regard to the Environmental Protection Agency Administrator's action.

Accordingly, Kentucky and the federal respondents moved to dismiss the case as moot.

4. On September 4, 1975, the court of appeals denied the motions to dismiss and denied the petitions for review (Pet. App. 1-12). The court held that the case was not moot because the Administrator's action in refusing to approve Section 1(1)(b) "is clearly capable of repetition, but * * * would evade review if the principle of mootness were strictly applied" (Pet. App. 6), and because "[t]he public [has an] interest in determination of the question in this case" (*ibid.*).

On the merits, the court held that the Administrator was not required to approve the original Kentucky plan because it did not include an "emission limitation" as required by Section 110(a)(2)(B) of the Clean Air Act, as added, 42 U.S.C. 1857c-5(a)(2)(B). The court relied upon *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 78, in which this Court stated that " 'emission limitations' * * * are regulations of the composition of substances

emitted into the ambient air * * *." The court concluded that the Administrator acted within the scope of his authority in refusing to approve that portion of the Kentucky plan "which might be construed to permit a source of pollutant emissions to continue operating * * * without the application of one or more systems which control the 'kind and amounts' of its air contaminant emissions" (Pet. App. 11).

ARGUMENT

1. Although we submit that the decision of the court of appeals on the merits is correct, we nevertheless disagree with the court's preliminary holding that the case is not moot. As we indicated above, Kentucky's current air pollution regulations do not contain Section 1(1)(b) and Kentucky "does not desire to administer the provisions of the regulation involved [Section 1(1)(b)] and does not wish to have such a regulation included in the 'Kentucky Plan' ".[2] Moreover, Kentucky has stated that "it appears that alternate control strategies are not to play a part in this Commonwealth's implementation of the Clean Air Act irrespective of the decision of this Court with regard to the Environmental Protection Agency Administrator's action" (*ibid.*). The case is therefore

---

[2] Brief for Intervenor Commonwealth of Kentucky before the United States Court of Appeals for the Sixth Circuit, at p. 12.

moot. See *Securities and Exchange Commission* v. *Medical Committee for Human Rights*, 404 U.S. 403.

Contrary to the court of appeals, the case cannot be considered a live controversy on the basis that the order involved is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515. The Administrator's disapproval of Section 1(1)(b) of the Kentucky plan is not "capable of repetition" so far as Kentucky is concerned, since Kentucky has decided that it does not wish to have Section 1(1)(b) included in its implementation plan and does not wish to use alternative control strategies irrespective of whether the Administrator is required to approve them.[3]

Moreover, there is no reason to suppose that the issue will in the future evade review. The Administrator's disapprovals of state plans are not "short term orders," *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, *supra*, that expire before judicial review can occur. If a State wishes to contest the Administrator's interpretation, it need only promulgate an implementation plan permitting

---

[3] The "public interest in having the legality of the practices settled," *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, is not in itself sufficient to overcome mootness. See *DeFunis* v. *Odegaard*, 416 U.S. 312. While the Court has held that a case may not be moot if the allegedly illegal conduct is likely to recur (345 U.S. at 632), in this case no such likelihood exists since the State will not seek to reinstitute intermittent controls. See *United States* v. *Phosphate Export Assn.*, 393 U.S. 199, 203.

intermittent controls without a prior showing that a continuous limitation on emissions is unavailable.[4] This case therefore does not present the exceptional situation in which the *Southern Pacific Terminal* doctrine might permit a departure from "[t]he usual rule in federal cases * * * that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade*, 410 U.S. 113, 125; *United States* v. *Munsingwear*, 340 U.S. 36; *DeFunis* v. *Odegaard*, 416 U.S. 312, 319.

2. In any event, the decision of the court of appeals on the merits is correct and does not conflict with any decision of this Court or any court of appeals.[5]

---

[4] In fact, the legality of the Administrator's actions in this regard has been tested and settled in two other circuits. See *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 489 F.2d 390, 406-409 (C.A. 5), reversed in part on other grounds *sub nom. Train* v. *Natural Resources Defense Council*, 421 U.S. 60; *State of Texas* v. *Environmental Protection Agency*, 499 F.2d 289, 311-313 (C.A. 5); *Kennecott Copper Corporation* v. *Train*, C.A. 9, No. 75-1335, decided November 28, 1975, petition for a writ of certiorari pending, No. 75-1029.

[5] In *Union Electric Company* v. *Environmental Protection Agency* (No. 74-1542), argued January 21, 1976, we contended that upon judicial review of the Administrator's approval of a state implementation plan under the Clean Air Act, the court may not consider claims that compliance is economically or technologically infeasible. As we argued in that case, there is no requirement in Section 110(a)(2) of the Act, 42 U.S.C. 1857c-5(a)(2), that in deciding whether to approve a state-submitted implementation plan the Admin-

a. Section 110(a)(2)(B) of the Clean Air Act, as added, 42 U.S.C. 1857c-5(a)(2)(B), requires that every state implementation plan include

> emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls.

Every court that has considered this language has construed it to require the use of all available measures for continuous limitation of emissions. See cases cited, note 4, *supra*.

In *Train* v. *National Resources Defense Council*, *supra*, 421 U.S. at 78, this Court stated that state implementation plans to attain and maintain national ambient air standards

> must include "emission limitations," which are *regulations of the composition* of substances emitted into the ambient air from such sources as power plants, service stations, and the like.

---

istrator must consider whether compliance with the emission limitations therein is feasible. Accordingly, so long as the plan is sufficient to achieve ambient air standards and requires continuous emission limitations, it must be approved.

If a state plan can be construed to permit intermittent emission limitations, however, the Administrator must review it to determine whether the intermittent controls are justified. Only if the demonstration of adequacy which must accompany the submission of each implementation plan shows that constant emission controls are unavailable will the Administrator approve a plan that permits dispersion technology such as intermittent controls.

> They are specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards [emphasis supplied].[6]

The court below correctly interpreted this to mean that "emission limitations" do not include regulations that merely regulate the time during which pollutants may be dispersed into the atmosphere, which is the effect of intermittent controls.

b. The purpose of the Clean Air Act further confirms that Congress intended to require that state implementation plans require continuous emission controls if available. National primary ambient air quality standards are those "requisite to protect the public health," 42 U.S.C. 1857c-4(b)(1); national secondary ambient air quality standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with

---

[6] To be sure, the Court in *Train* held that "so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments" (*id.* at 91). But the Court was referring to modification of source-by-source emission limitations fixed by the State, which the Administrator must approve so long as the state plan as a whole provides for a mix of emission limitations from all sources sufficient to meet national air quality standards; if these limitations are sufficient, the Administrator may not raise the limitation on a particular source to force technological improvement as to that source. The Court did not thereby preclude the Administrator from withholding his approval of state implementation plans that did not employ "emission limitations" because they could be construed to permit intermittent emission controls when continuous controls were available.

the presence of such air pollutant in the ambient air," 42 U.S.C. 1857c-4(b)(2). State implementation plans must provide for attainment and "maintenance" of these standards, 42 U.S.C. 1857c-5(a)(1). Intermittent controls, however, do not provide a sufficient guarantee that national primary and secondary ambient air quality standards will be maintained.

As the court of appeals stated in *Kennecott Copper Corporation* v. *Train, supra,* slip op. 10:

> Intermittent control systems (such as those restricting production, or utilizing less polluting fuels, during periods of adverse weather) do limit the amount of pollutant emitted while such controls are being applied. However, the reliability and enforceability of such controls is questionable; they may not be implemented when they are in fact needed. Moreover, there is no assurance that temporary reductions in emissions resulting from such controls will not be balanced, or even exceeded, by an increase in the amount of pollutant emitted when weather conditions improve and production is increased to make up for prior losses, or more polluting fuels are again used. Thus, intermittent controls, like tall stacks, may only disperse the pollutant rather than reduce it. Tall smokestacks disperse a pollutant through greater quantities of air; intermittent control systems disperse a pollutant through longer periods of time. Neither assures a reduction in the quantity of the pollutant eventually emitted. Under section [110(a)(2)(B)], EPA may require that assurance. [Footnote omitted.]

Moreover, the use of intermittent controls that merely regulate the timing of dispersion of pollutants into the atmosphere is at odds with the policy of non-degradation in the Clean Air Act.[7] As the court of appeals stated in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra*, 489 F. 2d at 408-409:

> Dispersion * * * techniques operate by keeping pollutants out of areas of high pollutant concentration, and dispersing them to lower concentration areas; their objective is to reduce concentrations in high-concentration areas. Inevitably, however, the pollutants emitted into the atmosphere must end up somewhere; and the atmosphere at their destination, wherever that may be, will be degraded, in violation of the congressional policy. The only techniques fully capable of guaranteeing non-degradation are [continuous] emission limitation techniques.[8]

c. "[S]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight," *National Labor Relations Board* v. *Bell Aerospace*

---

[7] This policy requires that areas of clean air, where air quality indices are above the levels set by the national standards, must not be degraded, even though degradation will not reduce the quality of the air below levels specified by the standards. See S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2 (1970); H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 1, 2, 5 (1970); *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253, 255 (D.D.C.), affirmed *sub nom. Fri* v. *Sierra Club*, 412 U.S. 541.

[8] The court classified both tall stacks and intermittent controls as dispersion techniques (489 F.2d at 394 n.2).

Company, 416 U.S. 267, 275,[9] and the legislative history of subsequent amendments to the Clean Air

---

[9] In its petition (at pp. 18-23), TVA contends that a number of statements by former Administrator Ruckelshaus show that he interpreted Section 110(a)(2) of the Clean Air Act to permit intermittent emission controls instead of continuous emission controls. In the statements to which TVA refers, however, Administrator Ruckelshaus merely restates the general congressional policy, reflected in the Act, to require the Administrator to approve state plans that meet the ambient air quality standards and not to dictate to the state precisely what techniques should be used to maintain those standards. Accordingly, he construed the term "emission limitations" to include a variety of measures, such as restriction on the hours and manner of operations. (Hearings on Implementation of the Clean Air Act Amendments of 1970—Part 1 (Title I) before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess. 314-315 (1972).)

Administrator Ruckelshaus did not construe the Act, however, to permit the approval of state implementation plans that would not reasonably guarantee the maintenance of the ambient air quality standards, or that would not assure a reduction in the quality of the pollutant eventually emitted; to the contrary, he assumed throughout that plans would be approved only if they included measures that were sufficient for attaining and maintaining such standards. In fact, at an earlier point in the hearings he stated, "whenever we adopt a control strategy, the purpose of that control strategy is to reduce emission * * *. What we mean by emission limitations is really emission reduction * * *" (Hearings, *supra*, at 265). Intermittent control measures are not satisfactory "emission limitations", however, since they do not guarantee the maintenance of the ambient air quality standards or assure a reduction in the quantity of pollutants eventually emitted (see pp. 11-12, *supra*). Accordingly, the statements of Administrator Ruckelshaus should not be construed to permit intermittent emission controls when continuous emission controls are available.

Act shows that Congress intended that state implementation plans should require the use of continuous emission controls when available.

Congress amended the Clean Air Act in 1974, in response to the 1973 oil embargo and resulting energy crisis. As it passed the House, the 1973 predecessor to the 1974 amendment, which subsequently was vetoed, permitted the permanent use of intermittent controls at certain emission sources.[10] The Conference Committee eliminated this provision and in its draft permitted intermittent controls only by pollution sources that converted to coal and then only as a temporary relief measure under specified conditions.[11]

In March 1974, the Administrator transmitted a new proposed bill to the House which, in pertinent part, was the same in substance as the statute eventually adopted. The Administrator also transmitted another proposal, which he did not support, that would have amended Section 1857c-5(a)(2)(B) to provide that nothing in that section was to be construed " 'to preclude use of * * * intermittent control measures.' " [12] The Administrator stated that this

---

[10] Murphy Amendments to H.R. 11450, Section 201 93d Cong., 1st Sess. (1973); 119 Cong. Rec. 41775-41777 (1973).

[11] S. Conf. Rep. No. 93-663, 93d Cong., 1st Sess. 83-84 (1973).

[12] Letter dated March 22, 1974, from Russell E. Train, Administrator of EPA, to Hon. Carl T. Albert, Speaker of the House of Representatives, attached to H.R. Rep. No. 93-1013, 93d Cong., 2d Sess. (1974). See *Kennecott Copper Corporation* v. *Train*, *supra*, slip op. 14.

proposed amendment, which was intended "'to allow the use of intermittent control strategies as a permanent method for achieving compliance with stationary source emission standards,'" would "'significantly weaken the Clean Air Act.'" The Administrator then reaffirmed the contrary position taken by the Environmental Protection Agency, stating, "'[a]s in the past, EPA will contend that the intermittent controls can be used only as an expedient, temporary control measure.'" [13]

In the course of presenting to the Senate the Conference Report on the 1974 amendment, Senator Muskie, Chairman of the Subcommittee on Air and Water Pollution and manager of the bill in the Senate, stated (120 Cong. Rec. S 10409 (daily ed., June 12, 1974)):

> * * * [N]o one should view limited application of enforceable strategies related to this legislation as a precedent for future legislation or as a reinterpretation of the requirements of the existing law which bar the application of intermittent control strategies as a substitute for emission limitations.

When finally enacted, the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246, added a new Section 119 to the Clean Air Act, 42 U.S.C. (Supp. IV) 1857c-10, which permits certain power plants and other large emission sources that convert from burning oil or

---

[13] *Kennecott Copper Corporation* v. *Train, supra,* slip op. 14-15.

natural gas to burning coal to obtain temporary relief from air pollution control requirements and thereby to use intermittent controls temporarily if certain specified conditions are met. One of the conditions is that the source in question must enter into binding contracts to acquire either a long-term supply of low-sulphur coal or a "continuous emission reduction system." Whichever alternative is chosen, the arrangement must achieve the necessary degree of emission reduction not later than December 31, 1978. Use of intermittent controls after that date is not permitted. See Section 119(c)(2)(B) and (C), 42 U.S.C. (Supp. IV) 1857c-10(c)(2)(B) and (C).

Since the purpose of this legislation was to encourage certain power plants to convert from oil or gas to coal and to provide relief to those plants that switched to coal because of the oil supply crisis, it is inconceivable that Congress intended to impose on such sources a greater burden than if they had not converted. Accordingly, Congress must have assumed that intermittent controls were not permitted prior to the 1974 amendment.

CONCLUSION

For the reasons stated, it is respectfully submitted that if the Court agrees that the case is moot, the petition for a writ of certiorari should be granted, the judgment should be vacated and the case remanded for dismissal as moot. Otherwise, the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

RAYMOND N. ZAGONE,
EDWARD J. SHAWAKER,
CHARLES W. SHIPLEY,
Attorneys.

FEBRUARY 1976.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 200928 209